BRB Nos. 12-0635
and 12-0635A

JOSE A. FIGUEROA	)	
	)	
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
WORLDWIDE LANGUAGE RESOURCES, INCORPORATED	)	DATE ISSUED: 06/26/2013
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier- Respondents Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Donald W. Mosser, Administrative Law Judge, and the Order Denying Motion for Reconsideration and Granting Motion for Clarification of Paul C. Johnson, Associate Chief Administrative Law Judge, United States Department of Labor.

Samuel S. Frankel, Jr. (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Robert N. Dengler (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (2011-LDA-00357) of Administrative Law Judge Donald W. Mosser and the Order Denying Motion for Reconsideration and Granting Motion for Clarification of Administrative Law Judge Paul C. Johnson rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*., as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant started work for employer as a mail handler at Bagram Airfield in Afghanistan in November 2008. He transferred to Camp Phoenix in February 2009. In August 2009, claimant experienced chest pain and had difficulty breathing while off-duty in the middle of the night. Claimant mentioned this incident to his supervisor, who instructed him to seek medical attention. Claimant was diagnosed with angina pectoris and hypertension. CX 4 at 2. Claimant was sent to the medical facility at Bagram Airfield on August 13, 2009, from which he was transferred to the Landstuhl Regional Medical Center (Landstuhl) in Germany for additional testing. Claimant was medically discharged from Landstuhl on August 16, 2009, with a diagnosis of non-cardiac chest pain and uncontrolled hypertension. *Id*. at 29. Claimant returned to Afghanistan on August 25, 2009. Employer terminated claimant on August 26, 2009, and he returned to the United States. Claimant received treatment from Dr. Dewell for hypertension and other medical conditions. CX 5. Claimant sought compensation and medical benefits for treatment related to his chest pain incident.

In his decision, Judge Mosser (the administrative law judge) found that claimant established a prima facie case for invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), based on his chest pain and his employment in Afghanistan, which established that he was working in a "zone of special danger." The administrative law judge found that employer failed to rebut the presumption, since the opinion of Dr. Das focused only on the fact that claimant's chest pain occurred when claimant was not working. The administrative law judge found that claimant did not establish he was disabled after August 25, 2009, when he was released to work without restrictions. Thus, the administrative law judge denied the claim for compensation. The administrative law judge found that employer is liable for the medical treatment claimant received at Landstuhl, totaling $7,178.47.

Claimant's motion for reconsideration and clarification was assigned to Judge Johnson, as Judge Mosser had left the Department of Labor. Judge Johnson denied the motion for reconsideration. Judge Johnson granted the motion for clarification, finding

that Judge Mosser intended to require that employer pay for the medical care claimant received at Landstuhl but not for any other medical treatment. Order at 2.

Claimant appeals the administrative law judge's denial of compensation for the period from August 14 to 25, 2009. Claimant also challenges the denial of medical care after August 25, 2009. Employer responds, urging affirmance. Claimant filed a reply brief. BRB No. 12-0635. Employer cross-appeals the administrative law judge's finding that claimant's episode of chest pains constituted a work-related injury. Claimant filed a response brief, urging affirmance. Employer filed a reply brief. BRB No. 12-0635A.

Employer challenges the administrative law judge's findings that claimant established invocation of the Section 20(a) presumption and that it did not rebut the presumption.[1] In his decision, the administrative law judge stated that, "although [claimant] inadvertently was not asked to testify as to the specific dangers he faced every day or to elaborate on the protective equipment he obviously was required to wear, he was stationed at an airbase close to Kabul at the time he suffered chest pains. He did testify that the working and living conditions of his assignment could at least be considered adverse." Decision and Order at 11. The administrative law judge concluded that claimant was working in a "zone of special danger" in a war zone in Afghanistan and, therefore, that conditions existed at work that could have caused his chest pains. *Id.*

Under the Act, an injury generally occurs in the course of employment if it occurs within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. *N.R. [Rogers] v. Halliburton Services*, 42 BRBS 56 (2008) (McGranery, J., dissenting); *Palumbo v. Port Houston Terminal, Inc.*, 18 BRBS 33 (1986). However, in cases arising under the Defense Base Act, the United States Supreme Court has held that employees may be within the course of employment even if the injury did not occur within the space and time boundaries of work, so long as the employment creates a "zone of special danger" out of which the injury arises. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951). "All that is required [for compensability] is that the "obligations or conditions of employment create the 'zone of special danger' out of which the injury arose." *O'Leary*, 340 U.S. at 505; *see also Gondeck v. Pan-American World Airways, Inc.*, 382 U.S. 25 (1965); *O'Keeffe*, 380 U.S. 359.

In *Rogers*, the claimant worked as an electrician at a military base located in Kabul, Afghanistan. The Board stated, "[I]t cannot be disputed that employer, by hiring claimant to work in Afghanistan, placed him in an environment with unique risks, thus creating a zone of special danger." *Rogers*, 42 BRBS at 61. In this case, the administrative law judge found that claimant similarly established adverse working

[1]We initially address employer's cross-appeal, since acceptance of its contentions would render moot claimant's appeal,

conditions in a war zone, notwithstanding the absence of evidence of specific extraordinary danger. Camp Phoenix was a forward operating base located outside of Kabul; claimant testified that it was surrounded by concrete blocks 12 to 16 feet high and barbed wire. Tr. at 43. Claimant testified he was hired to work twelve hours a day, seven days a week. *Id.* at 42. Claimant performed physically strenuous work in temperatures exceeding 100 degrees beginning in April 2009, on uneven ground, and with sporadic air conditioning service during the day and at night, where he slept in a "hooch" with three other employees. *Id*. at 45-50. As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's work in Afghanistan was in a "zone of special danger." *Rogers*, 42 BRBS 56; *see O'Leary*, 340 U.S. at 505; *see also O'Keeffe*, 380 U.S. 359; *Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982) (compensable heart attack while off-duty in barracks provided by employer in Greenland). Accordingly, we affirm the administrative law judge's finding that claimant established the working conditions element of his prima facie case. *See Urso v. MVM Inc.,* 44 BRBS 53 (2010).

Employer next argues claimant offered no credible evidence that his employment in Afghanistan presented an increased risk for his developing chest pains and that the chest pains were related to his uncontrolled hypertension.[2] The administrative law judge found that claimant established a harm for purposes of invoking the Section 20(a) presumption based on claimant's testimony that he sustained chest pains, the diagnosis at Camp Phoenix of angina pectoris and systemic hypertension, claimant's prior treatment for hypertension in June 2009 by Dr. Dewell, and Dr. Dewell's conclusion that claimant's pre-existing hypertension was aggravated in August 2009 by his employment in Afghanistan. Decision and Order at 9-10; *see* Tr. at 51, 59; CX 5 at 1, 11, 34.

Contrary to employer's contention, claimant was not required to affirmatively prove that his working conditions in Afghanistan in fact caused his chest pains and/or aggravated his pre-existing hypertension; rather, claimant need only establish that his employment in Afghanistan, a "zone of special danger," could have caused or aggravated his physical harm.[3] *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS

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[2]Employer does not challenge the finding that claimant sustained chest pains in Afghanistan. Chest pains, even without a change in underlying pathology, can constitute an "injury" within the meaning of the Act. *See Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984).

[3]Employer also asserts that claimant never made a claim based upon his hypertension. In his Pre-Hearing Statements, claimant alleged a "pulmonary cardiac condition," ALJX 1, and "aggravation of pre-existing hypertensive condition … due to harsh and/or stressful working conditions." ALJX 6. The administrative law judge rationally found that the claim based on the aggravation of claimant's hypertension is a "cardiac" claim. Decision and Order at 10 n.5. Thus, we reject employer's assertion.

60(CRT) (1st Cir. 2004); *Damiano v. Global Terminal & Container Service.*, 32 BRBS 261 (1998); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP,* 455 U.S. 608, 14 BRBS 631 (1982). The evidence: (1) that claimant had pre-existing hypertension; (2) that claimant suffered chest pains in Afghanistan; (3) and that claimant was diagnosed with angina pectoris and systemic hypertension, constitutes substantial evidence that claimant's employment in the "zone of special danger" could have caused his chest pains and/or aggravated his pre-existing hypertension. Therefore, we affirm the administrative law judge's application of Section 20(a) to presume that claimant's hypertension was aggravated and his chest pains were related to his employment in Afghanistan. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005).

Employer contends the administrative law judge erred in finding that the opinion of Dr. Das does not rebut the Section 20(a) presumption, as Dr. Das opined that hypertension did not cause claimant's chest pains and that the chest pains were not related to claimant's employment. *See* EX 13 at 14-15, 63. Upon invocation of the Section 20(a) presumption, as here, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Brown v. Jacksonville Shipyards, Inc.,* 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). The administrative law judge found that Dr. Das opined that claimant's chest pains were not work-related because they did not occur during the "process of claimant's physical activities associated with work" as a mail handler. Decision and Order at 12; *see* EXs 12 at 7, 13 at 13-15. The administrative law judge found this opinion is not sufficient to rebut the presumption because, under the "zone of special danger" doctrine claimant's chest pains did not have to occur while he was working in order to have arisen in the course of his employment. Decision and Order at 12. Thus, while Dr. Das states that claimant's chest pain is not related to his pre-existing hypertension, he did not address whether claimant's working in Afghanistan, irrespective of claimant's job duties and when the chest pains occurred, contributed to the chest pains claimant experienced while off-duty there. As the "zone of special danger" doctrine applies when the injury does not occur during the performance of the worker's job duties, *see generally O'Leary*, 340 U.S. at 507, the administrative law judge did not err in finding the opinion of Dr. Das insufficient to rebut the Section 20(a) presumption. *See generally Bath Iron Works Corp.*

See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 613 n.7, 14 BRBS 621, 633 n.7 (1982); *see also Meehan Seaway Service, Inc. v. Director, OWCP [Hizinski]*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Downey v. General Dynamics Corp.*, 22 BRBS 203 (1989).

v. Fields, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). Therefore, we affirm the administrative law judge's finding that claimant sustained a work-related injury.

In his appeal, claimant challenges the administrative law judge's failure to award him compensation for the period he was undergoing treatment for his chest pains at Bagram Airfield and in Landstuhl, Germany. Claimant notes that his claim and pre-hearing statement sought compensation commencing August 13 or 14, 2009.[4] *See* CX 1 at 2, ALJX 6. In his decision, the administrative law judge addressed only claimant's entitlement to compensation after he was released to return to work on August 25, 2009. Decision and Order at 12-14. The administrative law judge found there is no medical evidence that claimant was disabled by his "controlled hypertension" after August 25, 2009, and he thus denied compensation benefits.[5] *Id*. at 14. As claimant's pre-hearing statement, which was filed approximately three weeks before the hearing, requested temporary total disability compensation from August 14, 2009, the administrative law judge should have addressed this issue in his decision. *See generally Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). Therefore, we remand the case for a determination of claimant's entitlement to compensation from August 14 to August 25, 2009.[6]

Claimant also challenges the limited award of medical benefits. Specifically, claimant contends he was entitled to select a treating physician to care for his work-related injury. In his decision, the administrative law judge found employer liable for claimant's medical treatment totaling $7,178.47 at Landstuhl in August 2009 because these expenses were incurred "in addressing the cause of claimant's chest pains earlier that month and uncontrolled hypertension is the primary diagnosis obtained through that

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[4]The claim was filed on May 24, 2010; the pre-hearing statement was filed on October 27, 2011. The hearing was conducted on November 15, 2011.

[5]Claimant does not challenge the denial of compensation after August 25, 2009, and this finding, therefore, is affirmed. *Scalio v. Ceres Marine Terminals,* 41 BRBS 57 (2007).

[6]We note that the record shows that employer paid claimant's regular wages during August 2009. CX 2 at 1. Should the administrative law judge find claimant entitled to compensation, the administrative law judge must address whether these payments were intended as advance payments of compensation such that employer is entitled to a credit pursuant to Section 14(j), 33 U.S.C. §914(j). *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998).

cardiac assessment." Decision and Order at 14-15. However, the administrative law judge found that employer is not liable for any subsequent medical expenses "because there is no opinion or evidence connecting these expenses to claimant's hypertension." *Id*. at 15. On reconsideration, Judge Johnson attempted to clarify the administrative law judge's decision with respect to claimant's entitlement to medical care. Order at 2. Judge Johnson stated that, "[A]lthough the Order section does not specify treatment for which employer is liable … I find that it was clearly Judge Mosser's intent to require Employer/Carrier to pay only the cost of medical care at Landstuhl …, and not for any other medical treatment." *Id*. The Order section of the administrative law judge's decision provides, in pertinent part, that employer "is liable for medical expenses of the claimant under Section 7 of the Act relating to the medical incident involving the claimant in August of 2009." Decision and Order at 15.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical and other attendance or treatment . . . medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." In order for a medical expense to be awarded, it must be necessary for the treatment of the work injury. *Ingalls Shipbuilding, Inc., v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); 20 C.F.R. §702.402. It is claimant's burden to prove the elements of his claim for medical benefits. *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996).

The administrative law judge's decision found that claimant failed to establish he was disabled by hypertension after August 25, 2009. The administrative law judge denied the claim for subsequent medical treatment because claimant failed to show that any expenses incurred were for the treatment of hypertension. Decision and Order at 14. This statement in conjunction with his "Order" could be interpreted as finding that claimant is entitled to additional medical care if he establishes he has treatment for hypertension; only the reimbursement of past expenses was limited to those incurred at Landstuhl. On reconsideration, however, Judge Johnson interpreted the administrative law judge's decision as limiting the award of medical benefits to only the treatment and diagnosis of claimant's chest pains in August 2009. As the basis for the denial of ongoing medical treatment is not clear, we must remand the case for additional findings.

A claimant need not be disabled in order to be entitled to medical treatment for his work injury. *Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). Claimant is entitled to select a treating physician for his work injury; claimant, however, must obtain prior authorization from employer or the district director for treatment by this physician. 33 U.S.C. §907(b); *Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981). In addition, claimant bears the burden of proving that he requires continuing care for his work-related injury. *Baker*, 991 F.2d 163, 27 BRBS 14(CRT); *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988); *see also Schoen*, 30 BRBS at 114. Claimant is not entitled to continuing medical care once he has

recovered from the work injury. 33 U.S.C. §907(a); *see generally Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). On remand, the administrative law judge should specifically address claimant's contention that he is entitled to additional medical care for his work-related injury from his free choice physician.

Accordingly, the case is remanded for a determination of claimant's entitlement to compensation from August 14 to August 25, 2009, and of whether claimant is entitled to continuing medical care for hypertension. In all other respects, the Decision and Order and the Order Denying Motion for Reconsideration and Granting Motion for Clarification are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge